

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

BARRY K. HARRIS v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Williamson County
Nos. I-173-800; I-600-183 Robbie T. Beal, Judge**

No. M2007-02845-CCA-R3-CD - Filed August 13, 2008

This matter is before the Court upon the State's motion to affirm the judgment of the trial court by memorandum opinion pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. The Petitioner appeals the trial court's denial of his "Motion for Vacate [sic] of Sentence, Resentencing by Jury." Upon a review of the record in this case, we find that the Petitioner failed to satisfy the applicable statutory timing requirements, and that this case meets the criteria for affirmance pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. Accordingly, the State's motion is granted and the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed Pursuant to Rule 20 of the
Court of Criminal Appeals**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Barry K. Harris, pro se, Clifton, Tennessee.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; for the Appellee, State of Tennessee.

MEMORANDUM OPINION

A Williamson County jury convicted the Petitioner of one count of theft of merchandise over \$500 and one count of driving on a suspended license. He then pled guilty to two counts of theft of merchandise over \$1000. On direct appeal, this Court affirmed the judgments of the trial court. *See State v. Barry K. Harris*, No. M2001-01359-CCA-R3-CD, 2002 WL 1400047, at *1 (Tenn. Crim. App., at Nashville, June 28, 2002) *perm. app. denied* (Tenn. Dec. 2, 2002).

On August 8, 2003, Petitioner filed a petition for post-conviction relief, but withdrew his petition on February 15, 2005. On August 8, 2006, Petitioner filed a “Motion for Sentence Reduction,” which was denied by the trial court on August 14, 2006. On September 15, 2006, Petitioner filed a “Motion for Reduction of Sentence or Suspension,” which was denied by the trial court on September 22, 2006. On October 30, 2007, Petitioner filed a “Motion for Vacate [sic] of Sentence, Resentencing by Jury,” which was denied by the trial court on November 13, 2007. On November 19, 2007, Petitioner filed a “Motion for Vacate [sic] of Sentence, Resentencing by Jury,” which was denied by the trial court on November 30, 2007. On December 10, 2007, Petitioner timely filed this appeal of the November 30, 2007 trial court order.

After reviewing the record and the Petitioner’s brief, it is unclear to this Court whether the petition is one asserting a claim for post-conviction relief or one asserting that his sentence should be reduced pursuant to Rule 35. The Petitioner titles his motion as one to vacate the sentence in order to be re-sentenced by a jury, and he cites to the recent Sixth Amendment cases for support. Under either theory, there are procedural obstacles fatal to the Petitioner.

If reviewed as a petition for post-conviction relief, Petitioner’s appeal is time barred by Tennessee Code Annotated section 40-30-102, which governs such actions. That section provides in pertinent part that:

(a) Except as provided in subsections (b) and (c), a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken. . . . The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise.

(b) No court shall have jurisdiction to consider a petition filed after the expiration of the limitations period unless:

(1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The petition must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial;

(2) The claim in the petition is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the petition must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid.

(c) This part contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. If a prior petition has been filed which was resolved on the merits by a court of competent jurisdiction, any second or subsequent petition shall be summarily dismissed...

On December 2, 2002, the Tennessee Supreme Court denied Petitioner's Application for Permission to Appeal, which began to run the clock governing Petitioner's ability to file a petition for post-conviction relief. Petitioner filed the present motion on November 19, 2007, nearly four years past the expiration of the permissible filing period set forth in the statute. The statute removes from all courts jurisdiction to consider post-conviction petitions after the expiration of the limitations period unless one of the enumerated exceptions applies. See T.C.A. § 40-30-102(b) (2006). Only section (b)(1), *supra*, is potentially applicable to Petitioner's appeal.

Petitioner maintains that the enhancement of his sentences violated the Sixth Amendment to the United States Constitution as interpreted in *Blakely v. Washington*, 542 U.S. 296 (2004), *Cunningham v. California*, 549 U.S. 270 (2007), and *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007) (hereinafter "*Gomez II*"), because the trial court relied upon factors not found by a jury. We cannot agree. The rule in *Blakely*, *Cunningham* and *Gomez II*, is not a new rule but a clarification of the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Because the constitutional rights in question were recognized at the time of trial, Petitioner is not entitled to tolling under subsection (b)(1). Therefore, if viewed as a petition for post-conviction relief, the petition should be dismissed as time barred.

Similarly, if Petitioner's appeal is viewed as a motion for sentence reduction, it must be rejected for failing to satisfy the constraints specified in Rule 35 of the Tennessee Rules of Criminal Procedure, which governs such actions. That section provides in pertinent part that:

(a) The trial court may reduce a sentence upon motion filed within 120 days after the date the sentence is imposed or probation is revoked. No extensions shall be allowed on the time limitation. No other actions toll the running of this time limitation.

The trial court imposed the Petitioner's sentence on July 18, 2001. The Petitioner filed the instant motion on November 19, 2007, over five years beyond the 120 day time period for Rule 35. Therefore, if viewed as a Rule 35 motion for sentence reduction, the motion should be dismissed as untimely.

Because we conclude that Petitioner failed to meet the statutory timing requirements for either post-conviction or a Rule 35, the State's motion is granted. The judgment of the trial court is affirmed in accordance with Rule 20 of the Court of Criminal Appeals.

ROBERT W. WEDEMEYER, JUDGE